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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

UBALDO CABRAL,

Defendant and Appellant.

E048379

(Super.Ct.No. BAF004856)

OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge.
Affirmed as modified.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-
Ladendorf, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

On October 24, 2006, an information charged defendant and appellant Ubaldo Cabral with five counts arising from offenses committed against his former girlfriend, Jane Doe, on May 24, 2006: rape by force under Penal Code¹ section 261 subdivision (a)(2) (count 1); kidnapping to commit rape under section 209, subdivision (b)(1) (count 2); domestic battery with corporal injury under section 273.5, subdivision (a) (count 3); assault with a deadly weapon under section 245, subdivision (a)(1) (count 4); and burglary under section 459 (count 5). The information also alleged that defendant personally used a deadly weapon in committing count 3 under sections 12022, subdivision (b)(1), and 1192.7, subdivision (c)(23).

On February 6, 2009, a jury convicted defendant of counts 1 through 3, and 5. Defendant was found guilty of the lesser included offense of assault on count 4. The jury found the weapon allegation in count 3 to be not true.

On May 3, 2009, defendant was sentenced to seven years to life plus seven years in prison. Defendant's sentence included an indeterminate term of seven years to life for kidnapping to commit rape (count 2), a consecutive six years for rape by force (count 1), a consecutive one year (one-third the midterm) for domestic battery with corporal injury (count 3), a concurrent 180 days in county jail for assault (count 4), and a four-year term for burglary (count 5), which was stayed under section 654.

¹ All statutory references are to the Penal Code unless otherwise specified.

On appeal, defendant argues—and the People concede—that defendant’s sentence for rape by force should have been stayed under section 654. For the reasons set forth below, we agree with the parties that the sentence for rape by force should have been stayed because it arose out of the same indivisible course of conduct as kidnapping to commit rape.

II

STATEMENT OF FACTS

In 2003 or 2004, Jane Doe and defendant ended their long-term relationship. During their relationship, Jane Doe and defendant had two children. Although defendant repeatedly attempted to reconcile, Jane Doe refused.

In mid-May of 2006, Jane Doe moved in with her new boyfriend, Troy Tremblay. Jane Doe and Tremblay lived in a mobilehome in the City of Cabazon. On May 24, 2006, about 6:00 p.m., Jane Doe and Tremblay were in the rear bedroom of the mobilehome when Jane Doe saw someone reach up and attempt to open the bedroom window. Jane Doe saw defendant standing on a chair outside the bedroom window; she opened the window and told defendant to leave. Defendant did not leave. Instead, defendant responded that he could enter the home any time he wanted because Jane Doe lived there. Defendant then pushed a shovel through the window and tried to hit Jane Doe with it. Jane Doe grabbed a broom and tried to push defendant back through the window. As Jane Doe swung a broom at defendant, he punched his arm through the window; defendant broke the window and cut his arm. Jane Doe then told defendant she

was going to call the police and left the bedroom. Jane Doe then heard defendant banging on the front door to force it open. She went out through a side door and jumped over a fence to call 911.

Jane Doe tried several houses before she was able to find a phone to call 911. After calling 911, she returned to the mobilehome. Believing that defendant had left, Jane Doe entered the home to find it in disarray; the countertops and windows were broken, the bathroom medicine cabinet was torn off the wall, items were thrown about, and blood was spattered all over the walls. Jane Doe feared that defendant had injured Trembaly; she left the mobilehome and screamed for Tremblay. As Jane Doe walked around the house, defendant popped up from behind a fence and jumped into the backyard. When Jane Doe asked what happened to Tremblay, defendant replied, “[y]ou’ll find out right now” and charged at her. Jane Doe grabbed a branch, swung it at defendant, and struck him. Defendant, however, grabbed the branch away from Jane Doe and struck her with it. Defendant then punched Jane Doe between her chest and stomach with his fist; he knocked her down. Defendant continued to kick and punch Jane Doe.

Defendant grabbed Jane Doe by her hair and told her, “I’m going to show you what a wife’s supposed to do.” Immediately thereafter, defendant dragged Jane Doe by her hair on the ground toward the front door of the mobilehome. As they neared the front door, Jane Doe grabbed defendant by the leg, but he kicked her off and dragged her into the home.

Once inside the home, defendant released Jane Doe and attempted to lock the door. As Jane Doe tried to run out of the home, defendant grabbed her and shoved her against the wall. He ripped her dress halfway off. Jane Doe pleaded with defendant to leave.

Defendant tore Jane Doe's underwear and then knocked her to the ground. Defendant then got on top of Jane Doe and undid his pants; Jane Doe screamed for defendant to stop. Defendant then forced his penis into Jane Doe's vagina, but she was able to wiggle away. Defendant repeated, but Jane Doe wiggled away again. Defendant then pinned Jane Doe down and penetrated her as she screamed.

Sergeant Wilson Padilla from the Riverside County Sheriff's Department arrived at the mobilehome to investigate the 911 call. Approaching the front door, Sergeant Padilla heard a female screaming. He and his partner entered the residence and saw defendant on top of Jane Doe. Yelling and crying, Jane Doe was able to free herself and rapidly crawled out of the mobilehome on her hands and knees past the officers.

Defendant stood up with his hands raised; his pants were unbuttoned, his zipper was open, and his erect penis protruded through his open zipper. As Sergeant Padilla walked defendant out of the home, defendant said, "That's my wife, it's okay. There's nothing going on."

Jane Doe was transported by ambulance to the Riverside County Regional Medical Center. She had bruises on her back, legs, arms, and a large welt on the back of her left leg. The sexual assault response team conducted an interview and performed a

sexual assault examination. The nurse determined that Jane Doe's injuries and bruises were consistent with the history Jane Doe provided of the incident.

III

ANALYSIS

Defendant's sole contention on appeal is that his sentence on count 1 should be stayed under section 654 because it arose out of the same indivisible course of conduct as count 2. The People concede.

At the sentencing hearing, defendant argued that the court should stay the sentence on the rape and burglary convictions because the offenses were part of an indivisible course of conduct related to the kidnapping for rape conviction. The trial court stayed the sentence on the burglary conviction under section 654, but found that the rape was divisible from the kidnapping for rape. The court determined that defendant had different objectives from the kidnapping and the actual rape. The court stated: "[T]he objective is the asportation of the victim, to place her . . . in the situation where she's secreted inside the house where [defendant] can ultimately commit the crime of rape." The court went on to state "that the objective is different between the actual asportation to another placement so ultimately another crime can be accomplished if given the opportunity." Accordingly, the trial court imposed a determinate midterm of six years on the rape count, to run consecutively to the indeterminate seven-years-to-life sentence for the kidnapping for rape count.

Section 654 proscribes multiple punishments for a course of conduct that violates more than one statute but constitutes an indivisible transaction. (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) Whether a course of conduct is indivisible under section 654 depends on the intent and objective of the actor. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) “If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Ibid.*) Therefore, to permit multiple punishments, the evidence must support a finding that the defendant formed a separate intent and objective for each offense for which he was sentenced. (*Ibid.*) A defendant’s intent and objective are factual questions for the trial court (*People v. Adams* (1982) 137 Cal.App.3d 346, 355), which may properly infer a defendant’s intent from the circumstances surrounding his act.

The standard of review for defendant’s appeal is substantial evidence. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) Under this standard, we review the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the facts required to support its decision beyond a reasonable doubt. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) In this analysis, we must presume the existence of every fact the court could reasonably deduce from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) The trial court’s determination cannot be reversed on appeal unless it is unsupported by evidence presented at trial. (*People v. Ferguson* (1969) 1 Cal.App.3d 68, 75 [Fourth Dist., Div. Two] (*Ferguson*).)

In *People v. Latimer* (1993) 5 Cal.4th 1203 (*Latimer*), the California Supreme Court held that multiple punishment for kidnapping and rape is barred by section 654, where the sole purpose of the kidnapping was to facilitate the rape. (*Latimer*, at p. 1216.) Where the kidnapping is part of a continuous course of conduct motivated by one objective, rape, the kidnapping—even if completed before the rape was committed—will be treated as incidental to and a means of committing the rape precluding punishment for both offenses. (*Ibid.*) Therefore, where a defendant perpetrates both kidnapping for the purpose of committing rape and rape, imposition of separate sentences for both offenses is prohibited under section 654. (*Latimer*, at p. 1216.)

In *Latimer, supra*, 5 Cal.4th 1203, the defendant kidnapped his victim, drove her into the desert, raped her multiple times, and left her behind. (*Id.* at pp. 1205-1207.) The defendant was charged with three counts of rape, two counts of kidnapping, and one count of forcible oral copulation. The defendant was sentenced to prison for six years for the rapes and a consecutive term of one year eight months for the kidnapping. (*Id.* at p. 1206.) The defendant argued, and the court agreed, that the sentence imposed for kidnapping violated section 654 because the kidnapping had no objective apart from facilitating the rape. (*Latimer*, at p. 1205.)

Separate punishment for kidnapping and rape is permissible, however, where a defendant kidnaps a victim for one purpose, then later forms the intent to rape. (*People v. Burns* (1984) 158 Cal.App.3d 1178, 1181.) In *Ferguson, supra*, 1 Cal.App.3d 68, the court held that section 654 did not preclude multiple punishment for kidnapping and the

sex offenses because the defendant kidnapped the victims with the intent to act as a voyeur, not to commit rape. (*Ferguson*, at p. 75.) The evidence showed that the defendant kidnapped a husband and wife with the intention of watching them have sex. (*Id.* at pp. 72-75.) When the husband refused, the defendant sexually assaulted the wife. The defendant then secluded the wife and raped her several more times. (*Ibid.*) The court held that, because the defendant abandoned his objective as a voyeur and changed his objective to raping the wife after the kidnapping, the kidnapping was divisible from the rape and other sex crimes permitting multiple punishments under section 654. (*Ferguson*, at p. 75.)

In this case, unlike the facts in *Ferguson, supra*, 1 Cal.App.3d 68, defendant's actions arose out of a single course of indivisible conduct. Defendant was convicted of kidnapping for the purpose of rape and rape by force. Both of these convictions arose out of a single attack on Jane Doe. When Jane Doe returned from calling 911, defendant grabbed her by the hair and told her "I'm going to show you what a wife's supposed to do." Defendant then dragged Jane Doe by her hair from the yard into the mobilehome. Therefore, defendant was convicted of kidnapping *to commit* rape. After defendant got the victim into the mobilehome, he raped her. There is no evidence to indicate that defendant's purpose to commit the rape was an afterthought to the original kidnapping.

Therefore, like *Latimer, supra*, 5 Cal.4th at page 1216, the evidence supported that the aggravated kidnapping for purposes of rape under section 209 and the intended rape

were committed pursuant to a single objective—to rape Jane Doe. Hence, defendant’s sentence for the rape conviction in count 1 must be stayed under section 654.

IV

DISPOSITION

Defendant’s sentence is modified to stay execution of the sentence on count 1.

The sentence is otherwise affirmed.

The clerk of the superior court is directed to issue an amended abstract of judgment within 30 days of the date of this opinion and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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/s/ McKinster
Acting P.J.

We concur:

/s/ King
J.

/s/ Miller
J.